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The Illinois Supreme Court has again been called upon to declare the right of private contract despite legislative prohibition. In the late case of Braceville Coal Co. v. People, decided by that court, it was held that the act to provide for the weekly payment of wages by corporations, approved April 23, 1891, is unconstitutional. The reasoning upon which this conclusion was reached is as follows: The constitution guarantees that no person shall be deprived of life, liberty or property without due process of law. The words "due process of law" are synonymous with "the law of the land." And this means general public law, binding upon all the members of the community, and not partial or private laws, affecting the rights of private individuals or classes of individuals. That there can be no liberty protected by government that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement in his own way, subject to the restraints necessary to secure the same right to all others. Liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation as he may choose, subject only to the restraints necessary to secure the common welfare. The property which one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.

Laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions. This decision is in harmony with a former ruling of that court in the Frorer case and also with the view of the Supreme Court of Missouri in a late case. The Indiana court seem to be almost alone in their view of this question as expressed in Hancock v. Yaden.

One point made by the Illinois court in the case above referred to is especially valuable and of timely interest, viz: that the restriction of the right to contract affects not only the corporation and restricts its right to contract but that of the employee as well. And the court cites as an apt illustration of the manner in which it affects the employee, out of many that might be given, the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that large numbers of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production, for the reason that no sale could be found for the product. It was suggested, in the interest of employees and employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories and workshops to be opened and operated with less present expenditure of money. Public economists, and leaders in the interest of labor, suggested and advised this course. In the State of Illinois and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the State might do. The corporations would be prohibited entering into such a contract, and if they did so, the contract would be avoidable at the will of the employee, and the employer subject to a penalty for making it. The employee would therefore be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages, when the product of his labor could be sold. They would, by the act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for, and to receive the benefit of their labor, as others might do, denied them.

NOTES OF RECENT DECISIONS.

CONSPIRACY — COMBINATION TO FIX THE PRICE OF COAL.—The Court of Appeals of New York in People v. Sheldon, hold that an association formed by the retail coal dealers of a city, whose chief purpose is to fix minimum prices to be charged in the city and neighborhood, and whose conditions are calculated to prevent a dealer not a member from buying coal of the wholesalers, is a conspiracy to commit acts injurious to trade, though the fixing of prices be the only overt act, and the prices, as fixed, be reasonable. Andrews, C. J., says:

If the confederacy into which the defendants entered was an act "injurious to trade or commerce," irrespective of its results in the particular case, then there is no difficulty in maintaining the conviction. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by Parker, C. J., (Lord Macclesfield), in his celebrated judgment in Mitchel v. Reynolds, 1 P. Wms. 181, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth that presumption is excluded, and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction, and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers, and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, was the agreement one, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of Hooker v. Vandewater, 4 Denio, 349, and Stanton v. Allen, 5 Denio, 434, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in these cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See, also, People v. Fisher, 14 Wend. 10; Arnot v. Coal Co., 68 N. Y. 558.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement

was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this State, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

LANDLORD AND TENANT—EASEMENT—LEASE.—The Supreme Court of Illinois in Keating v. Springer, 34 N. E. Rep. 805, decide interesting questions of the law pertaining to easement of light and air. The holding is that a lessee of a building surrounded by land of the lessor has no implied right to the use of light and air from the adjoining land and that where a lease contains a provision that the lessor "shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises," the erection by the lessor of a building at the side of the leased premises so as to obstruct the light thereto is such a breach of the lease as will entitle the lessor to recover damages therefor, either in an action brought by him for that purpose, or as an offset to an action for rent accruing while he remains in possession. Magruder, J., says:

The evidence tends to show that a strong light is necessary for such business of manufacturing and polishing marble, as appellant was engaged in and that the demised premises were selected by the appellant for that business mainly because of their freedom from surrounding obstructions to the supply of light. Accordingly the defendant below offered to prove that the erection of the Springer building on the south side of the Keating building prevented the entry of light into the latter from the south and west. Upon objection by the plaintiff, the court refused to receive the testimony, and an exception was taken to its rulings by the defendant. The action of the trial court was correct, if there is no express covenant or agreement in the lease obligating the landlord to permit the light to pass over the south lot into the leased premises. The English doctrine is that, "if one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows." Washb. Easem. marg. p. 492, par. 5. This doctrine, however, does not prevail in the majority of the American States. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon if he has permitted the light and air to pass over it into the windows of his neighbor's house, situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription. 2 Woodf. Landl. & Ten. marg. p. 703, and notes; 1 Tayl. Landl. & Ten. §§ 239, 380, and notes; Keats v. Hugo, 115 Mass. 204; Mullen v. Stricker, 19 Ohio St. 135. In the early case of Gerber v. Grabel, 16 Ill. 217, this court held that such a right might be so acquired; but in the later case of Guest v. Reynolds, 68 Ill. 478, the Gerber Case was, in effect, overruled, and it was held that "prescription right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights," "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law." It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor; and that, where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property. Keats v. Hugo, *supra;* Mullen v. Stricker, *supra;* 1 Wood, Landl. & Ten. § 209, pp. 422-424, and note; Morrison v. Marquardt, 24 Iowa, 35. "A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other." 2 Woodf. Landl. & Ten. marg. p. 703, and note. "The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another." Mullen v. Stricker, *supra;* Haverstick v. Sipe, 33 Pa. St. 368; Keiper v. Klein, 51 Ind. 316. It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so. Myers v. Gemmel, 10 Barb. 537; Palmer v. Wetmore, 2 Sandf. 316; Keiper v. Klein, *supra;* 2 Woodf. Landl. & Ten. marg. p. 703, and note.

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement. Hilliard v. Coal Co., 41 Ohio St. 662; Brooks v. Reynolds, 106 Mass. 31; Keats v. Hugo, *supra;* Morrison v. Marquardt, *supra.* The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business. The lease contains the following provision: "Party of the first part shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises." The meaning of the word "premises," as here used, is not to be restricted to the Keating building alone, but embraces also the space in the rear thereof. The lease speaks of "all those premises · · · described as follows;" and then mentions, as constituting those premises—First, the basement; second, the store floor; "also a space in the yard in the rear," 25 feet deep. The space in the rear is as much a part of the premises demised as the basement and the store floor. Therefore the appellee agreed that he would not build nearer than 25 feet to the west line of the demised space west of the Keating

building, which space was 25 feet wide from east to west. The Springer building was 75 feet deep, while the Keating building was only 50 feet deep. It follows that the extension of the former west of the rear of the latter was along the south line of said space in the yard at the rear. The north wall of the Springer building did not extend further west than the west line of said space in the yard, and consequently the whole of the Springer building was south of the demised premises; hence we think counsel for appellee is right in the contention that no part of that building can be considered as an obstruction placed in the rear or to the west of the premises leased to appellant. But we cannot agree with counsel in so construing the language of the provision as to limit it to obstructions placed in the rear. The landlord does not agree that no obstruction higher than six feet shall be placed in the rear in such manner as to obstruct light to said premises. His agreement is that no obstruction higher than six feet shall be placed, whether to the north or to the west or to the south, in such manner as to obstruct light to said building; that is, to said space in the rear, as well as to said building. The Springer building—a brick structure, five stories high—was so constructed that its north wall joined the south wall of the Keating building, and the south line of the space in the yard at the rear thereof. In view of the express provision in the lease, as above quoted and construed, we are of the opinion that the defendant below was entitled to prove, if he could, that the Springer building was an obstruction placed in such manner as to obstruct light to said premises, and that the trial court should have admitted the proof upon that subject when offered.

It is claimed, however, that the offered evidence was properly rejected, because this suit is for rent accruing during a period while the tenant was in possession. In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenants of the enjoyment of the demised premises, will constitute an eviction. Hayner v. Smith, 63 Ill. 430. If the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent, if he continues to occupy the premises. Unless he abandons the premises, his obligation to pay the rent remains. Skally v. Shute, 132 Mass. 367. We said in News Co. v. Browne, 103 Ill. 317: "The rule is well settled that the wrongful act of the landlord does not bar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession either actually or constructively, or the premises rendered useless. Edgerton v. Page, 20 N. Y. 284; Haligan v. Wade, 21 Ill. 470; Leadbeater v. Roth, 25 Ill. 587." To "evict" a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises; hence it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right. Edgerton v. Page, *supra;* Boreel v. Lawton, 90 N. Y. 293; De Witt v. Pierson, 112 Mass. 8; Warren v. Wagner, 75 Ala. 188; Wright v. Lattin, 38 Ill. 293; 1 Tayl. Landl. & Ten. (8th Ed.) §§ 380, 381, and notes; Wood, Landl. & Ten. (2d Ed.) § 477, pp. 1104-1106; Alger v. Kennedy, 49 Vt. 109; Scott v. Simons, 54 N. H. 426; Jackson v. Eddy, 12 Mo. 209. But though the tenant will not be allowed to plead eviction as a bar to the recovery of rent where he has remained in possession after the performance of the acts which would have justified him in leaving the premises, yet he is not for that reason without remedy. In those States where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained by reason of the acts of the landlord, against the rent sought to be recovered. 1 Tayl. Landl. & Ten. § 374; 2 Tayl. Landl. & Ten. § 631; 2 Wood, Landl. & Ten. § 477, p. 1107; Edgerton v. Page, *supra;* Warren v. Wagner, *supra.* Taylor, in his work on Landlord and Tenant (Section 631), says: "By the law of recoupment, as now established in many of the United States, the tenant can avail himself, as a defense *pro tanto* to an action of debt for rent, of the landlord's breach of his covenants." The doctrine of recoupment is recognized in this State, and has been applied in proceedings begun by the issuance of distress warrants, and in actions for rent. Wright v. Lattin, *supra;* Lindley v. Miller, 67 Ill. 244; Lynch v. Baldwin, 69 Ill. 210; Pepper v. Rowley, 73 Ill. 262. In Lynch v. Baldwin, *supra*, where the landlord had issued a distress warrant, we said: "As to recouping damages for any loss or injury sustained by the tenant, we have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and, if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value." In Pepper v. Rowley, *supra*, which was an action to recover rent due under a lease, we said: "If there has been a breach of any covenant contained in the lease, whatever damage appellee had sustained in consequence thereof may be recouped in this action from the amount of rent due under the lease." In the case at bar the consolidated proceeding not only includes a suit for rent, but also several proceedings begun by the issuance of distress warrants; and the stipulation permits the defendant to introduce, under the general issue, "any defense and also any set-off, whether matter of contract or tort, that he may have, in the same manner . . . as if specifically pleaded." We therefore think that the offered testimony as to the effect of the erection of the Springer building upon the supply of light should have been received, in order that any damages which the defendant may have sustained thereby might be recouped in reduction of the amount of recovery, and that defendant was not precluded from showing such damages by his failure to surrender possession at an earlier date.

FOREIGN JUDGMENT — DISALLOWANCE OF CLAIM BY PROBATE COURT. — The Supreme Court of Wisconsin decides in the case of Sanborn v. Perry, 56 N. W. Rep. 337, that under Gen. St. Minn. 1878, ch. 53, § 6, requiring all claims against a decedent to be presented to the Probate Court within 18 months after his death, and prohibiting any action against an executor or administrator, the disallowance of a claim by the Probate Court of that State, not presented for nearly 20 years after the death of a resident and citizen of that State, has the force and effect of a judgment in favor of his estate against the claimant; and such disallowance, affirmed on appeal by the District Court of that State, is conclusive on the claimant in Wisconsin, under Const. U. S. art. 4, § 1, which requires "full faith and credit to be given in each State to the public acts, records and judicial proceedings in every other State." Cassoday, J., says:

The question presented by the record turns upon the effect to be given to the disallowance of the plaintiff's claim by the Probate Court of Ramsey county, Minn., October 9, 1889, and the affirmance thereof by the district court of the same county, June 3, 1890. By the stipulation and agreement of the parties made in the trial court, and of record herein, the statutes and laws of Minnesota, and the decisions of the Supreme Court of that State, as to the questions here involved, are to be considered and taken as evidence in this case. The debtor died December 25, 1860, and administrators of his estate were thereupon appointed by the Probate Court of Ramsey county, in which he resided at the time of his death. Upon granting letters of administration, the statute of that State required commissioners to be appointed to examine and adjust all claims and demands against the estate. Section 1, ch. 53, Gen. St. 1878. The statutes of that State also required the Probate Court to limit the time within which such claims should be presented, not exceeding 18 months in the first instance, and which time the court was at liberty to extend, so that the whole time should not exceed two years from the time of appointing such commissioners. Section 6, 7, *Id.* The statutes of that State also provided that "in no other case, except such as are expressly provided for in this chapter, shall any action be commenced or prosecuted against an executor or administrator." Section 53, *Id.* The case at bar does not come within the exceptions therein expressly made. True, the commissioners appointed failed to qualify, but the statute of that State also required the judge of the Probate Court to perform the duties conferred upon such commissioners. Chapter 69, Laws 1879. We perceive no reason why the plaintiff might not have presented his claim and forced the settlement of the estate. The Supreme Court of that State appears to have frequently held that every claim which is not presented for allowance within the time limited by the Probate Court for that purpose is forever barred, unless it came within some one of the exceptions named in the statute. Bank v. Slatter, 21 Minn. 172, 174; Fern v. Leuthold, 39 Minn. 212, 39 N. W. Rep. 399; Hill v. Townley, 45 Minn. 168, 47 N. W. Rep. 653; Hill v. Nickols, 47 Minn. 382, 50 N. W. Rep. 367. The law, as thus declared, was, in effect, continued and preserved by the new "Probate Code" of that State, which was enacted and approved April 24, 1889, and which by its express terms went into force and effect October 1, 1889, being eight days prior to the disallowance of the plaintiff's claim by the Probate Court of Ramsey county. Sections 102-115; 2 St. Minn. 1891, §§ 5715-5729. Moreover, section 102 of that Probate Code expressly declares that "the allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate." *Id.* § 5715. Thus it appears that the disallowance of the plaintiff's claim by the Probate Court, October 8, 1889, had the force and effect of a judgment in favor of the estate and against the plaintiff; and of course the affirmance of that judgment by the District Court, June 3, 1890, had the same force and effect, and therefore was conclusive upon the plaintiff in that State, whatever may have been the law of Minnesota prior to that enactment. If the plaintiff was dissatisfied with such adjudications of the Probate and District Courts, he had his remedy by appealing to the Supreme Court of that State. His failure to appeal would seem to indicate an absence of any doubt as to the correctness of that judgment. The question here presented is whether that judgment shall have the same force and effect in this State that it has in that State. The constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." Section 1, art. 4. This provision is binding upon the courts of this State as well as the courts of other States. The provision quoted has frequently been construed by the Supreme Court of the United States, and such construction is necessarily binding upon all State courts. Following Mills v. Duryee, 7 Cranch, 481, it was said by Marshall, C. J., speaking for the whole court, in Hampton v. McConnel, 3 Wheat. 235, that: "The doctrine there held was that the judgment of a State Court should have the same credit, validity, and effect, in every other court in the United States, which it had in the State where it was pronounced; and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States." So in McElmoyle v. Cohen, 13 Pet. 325, 326, Mr. Justice Wayne, speaking for the whole court, said: "The faith and credit due to it [the foreign judgment] as the judicial proceeding of a State is given by the constitution, independently of all legislation." And again, quoting from Mr. Story's Commentaries, he said: "If a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere in the States of the Union. If re-examinable there, it is open to the same inquiries in every other State." Numerous cases in the same court might be cited to the same effect. Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. Rep. 398; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224. In a very recent case it has been held by that court that "the construction given by the Supreme Court of a State to a statute of limitation of the State will be followed by this court, even in a case decided the other way in the Circuit Court [of the United States] before the decision of the State Court." Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466. See, also, Morgan v. Hamlet, 113 U. S. 449, 5 Sup. Ct. Rep. 583. The judgment of the Circuit Court is reversed, and the cause is remanded, with direction to affirm the judgment of the county court.

FALSE PRETENSE IN THE PURCHASE OF MERCHANDISE—RESCISSION OF THE CONTRACT OF SALE.

Introductory.—This discussion is intended to cover the *quasi*-criminal nature of subject rather than that of the offense against the public, to discuss the relative attitude of vendor and vendee of goods; the right of the one to make representations for the purpose of obtaining credit, and the right of the other to rely upon such representations in the sale of his merchandise, and to rescind the contract of sale of such merchandise when the falsity of the representations upon which credit was predicated, is ascertained.

The discussion is intended to be limited as nearly as convenient to the transactions among merchants and jobbers, restricting the term merchant to the retail trade. In order to constitute a false pretense, or to make the offense complete, of which the vendor complains, the falseness of the representations must, of course, be shown, since if no designedly misrepresentation is made by the vendee to obtain credit, there would not exist the intent to defraud. Of course, a man may have it in his heart not to pay for the goods for which he is ready to pledge his word, and he may even design not to pay for them, but if he makes no false statements of his ability to pay, and offers no inducements of a fraudulent character in order to obtain the credit, it cannot be claimed that he has resorted to false pretense in overruling objection or influencing the action of his creditor. Their relation under such circumstances would be simply as debtor and creditor. The vendor must rely upon these false statements to such a degree that the credit would not have been extended to vendee without them.[1] These statements on the part of the vendee constitute in a sense the consideration upon which the credit is extended and the vendor releases possession of his merchandise. These statements designed to influence the action of the vendor must be made before the sale is consummated. For upon the consummation of of the sale, statements of business character, financial worth, and all those representations of purchasers, wickedly designed to effect their object, can have no bearing upon this question and ought not to be received to show the offense of false pretense. The vendor did not rely upon such statements before concluding to extend the credit to the purchaser. In some of the States a prosecution for the offense of obtaining goods by means of false pretenses, cannot be maintained unless the statements relied upon to prove the offense are in writing. This is the rule in New York. In Illinois, in order to proceed against a fraudulent buyer, by an order of arrest in a civil case, these statements relied upon to show the false pretense must be in writing. There are authorities which hold that the exact time as to which the false statements are made before sale is consummated, is unimportant, except it may be to show whether or not the vendor relied upon these statements or not. If the false representations are made at any time before sale and the vendor acts, or is permitted to act, in pursuance of the false statements made by purchaser in order to get the credit which is ultimately given, this sale has been held void by the courts of Maine and Massachusetts by reason of the continued fraud on the part of vendee.[2] It would seem as if the courts in these States took a very liberal view of the rights of vendors, in these cases at least; probably a much more liberal view than they would take at this day. It would seem also, in order to obviate much misunderstanding that might arise in consequence of the lapse of time, and change of circumstances of the purchaser, these representations in order to bind him, in simple justice to him, should be renewed from time to time and reduced to writing.

Too much latitude is allowed either to vendor or purchaser in cases where credit is extended upon the representations of the one as to his ability to pay at that time, or some certain time, and the right of the other to insist upon these representations to cover the condition of a sale made at a date, for subsequent to that upon which the representations were made, although no objection is made on the part of the purchaser, and no explanation offered of his changed circumstances. It is unsafe to stand upon such a rule of practice, it seems to us. Again, goods may be purchased by the false representations, scheming and fraud of the vendee and these same

[1] See Adams v. Schiffer, 11 Col. 15, 7 Am. St. Rep. 202.

[2] See Seaver v. Dingley, 4 Me. 306; Skinner v. Flint, 105 Mass. 528.

goods passed on to third persons, and notwithstanding the bad character of the title of the original vendee he may sell to these third persons whose title will hold good if the matters within their knowledge did not reasonably suggest to him the propriety of inquiring into the transactions in which the vendor was engaged, and if this course would not have discovered the fraudulent character of the title of the original vendee. The position of the Maryland court may be sound in this case,[3] but the anomaly is presented of one acquiring title from one who has no title to transfer. However, the weight of authorities sanction this anomaly, so long as the transaction has the *bona fide* character attached to it. In cases like the above, of course, the goods, or merchandise procured by means of this kind of fraud could not be recovered by the original vendor. But upon rescinding the contract of sale and while the good remain in possession of the vendee, or in the possession of one having no color of legal title, they may be retaken by the vendor, and re-possessed by him and damages recovered for their detention. As the false pretense or misrepresentations constitutes a fraud upon the vendor, the contract is of course void, the vendor may therefore follow and retake them.[4] Some State courts have held that the vendor may reclaim the goods from a third party who took them in payment of an antecedent debt, or from an attaching creditor, or from an execution creditor, or an assignee in bankruptcy.[5] Raw materials that have been manufactured into various articles may be taken in its improved condition. In Georgia it has been contended that the legal right of rescinding the contract and taking the property of the defrauded vendor did not exist. If the rights of the vendor had depended upon mere misrepresentation made by the buyer as to his financial condition at the time of obtaining the goods, it is probable this view of the case would be right. But there is a distinction between the merely obtaining goods by false representations, which are often made for the purpose of inducing credit, when the buyer has full intention to pay, and where he has reasonable expectations of being able to pay, and the obtaining of goods with the intent in the mind of the buyer never to pay for them. It is difficult to determine in a prosecution for false pretense just what the intent of the buyer may be at the time he is making the representations for the purpose of inducing the credit. As with other crimes the true intent is to be arrived at by viewing all the circumstances as they existed at the time of the sale. But even here the buyer's intent may be utterly at variance with his financial condition at the date of sale. From the foregoing it will be seen that the offense of a false pretense is made up of four elements which must concur. False statements. The intent to defraud by means of them. The reliance of the vendor on these statements. The actual accomplishment of the fraud.[6]

False Statements.—The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment; or of an action two things are necessary, viz: that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be a statement of an existing fact.[7] Falsely claiming a differerent personalty in order to collect money constitutes this offense.[8] A representation of some fact or circumstance, calculated to mislead, which is not true.[9] And a false pretense *prima facie* imports a misrepresentation as to something existing. The misrepresentation must be of something material, constituting the inducement or motive to the act or omission of the other and by which he is actually mislead to his injury; and as to something as to which one party places a known confidence in the other, not merely of a matter of opinion equally open to both for examination and inquiry, and when neither party is presumed to trust to the other, but to rely upon his own judgment.[10] "The misrepresentation which will vitiate a contract of sale must relate not only to a material matter constituting an inducement to the contract,

[3] Higgins v. Lodge, 68 Md. 229, 6 Am. Rep. 439; *Per contra* opinion: See Nelson v. Lewis, 15 Oreg. 539.

[4] Hodgen v. Hubbard, 18 Vt. 504.

[5] Donaldson v. Farwell, 93 U. S. 631, note citation, page 8.

[6] See Commonwealth v. McDuffy, 126 Mass. 470.

[7] See Anderson's Dic. Law, 808.

[8] State v. Goble, 70 Iowa, 447.

[9] Commonwealth v. Drew, 19 Pick. 184.

[10] Mason Lumber Co. v. Buetel, 101 U. S. 637; Buckner v. Street, 15 F. R. 368.

but also to a matter respecting which the complaining party did not possess at hand the means of knowledge; and must be a misrepresentation on which he relied, and by which he was actually mislead to his injury."[11] False representations no matter how much they may influence the mind of the vendor of goods, will not be held sufficient upon which to set aside a contract of sale, unless these representations were material. Immaterial representations, whether true or false, cannot be made the basis of relief even although it may be shown that they were relied upon by vendor. There is no legal wrong, because vendor has no right to be the subject of relief from an injury, against which he did not use common prudence and ordinary intelligence. A moral wrong is done him. But these false representations upon which he chooses to rely may be of such a character that no person of ordinary intelligence could be misled thereby, and that should have had no influence whatever in inducing the vendor to enter into such agreement. In these cases the court or jury are to be satisfied that the representations, if made, were untrue and were material, in some way to the transaction, and of that character that a person of ordinary intelligence and possessing ordinary business qualifications would be likely to rely upon and be misled thereby.[12] Mr. Justice Marston giving the opinion of the court in the above case uses language as follows: "Anything short of this would be unsafe and would render it exceedingly dangerous for parties to conduct the ordinary business transactions of the day. It frequently happens that representations are made, while negotiations are pending, not strictly true. They may relate to the subject-matter, or have little or no reference thereto; neither party may place the slightest reliance thereon, yet should a dispute thereafter arise, how easy for the person who imagined he was injured to assert that he relied upon the representations made, believed them to be true, and so believing was induced to make the contract in dispute. It would indeed be difficult to disprove such an assertion if the materiality of such representations formed no part of the inquiry. The fraud must therefore be material to the transaction. If the representations relate to another matter, or to the one in dispute in but a trival and unimportant manner, they would afford no sufficient ground for setting aside the contract."[13]

To sustain the charge of obtaining money under false pretenses, it is essential to show, not only that false pretenses were made, but also that the person who parted with the money relied upon the false pretenses made and that the money was obtained by reason thereof.[14] The Michigan case, Mooney v. Davis,[15] is upon the question of the representations of merchants made to commercial agencies for a basis of obtaining credit in the business world. In this case defendants had a rating far above any assets in sight. A short time before assignment for benefit of creditors by defendants, an agent of a commercial agency had a personal interview with one of the partners during which this defendant stated that there was no material change in their financial standing. They got further credit at this time they must have been in an insolvent condition as shown by the inventory accompanying the deed of assignment. Plaintiffs had judgment, which was affirmed by the appellate court. Copies of the statements of financial condition of defendants and their ratings were held competent testimony, where authorized by defendants, and approved by them at a later date.

The Intent to Defraud.—It is a question of fact whether or not the buyer has obtained possession of the goods with the intention not to pay for them. The presumption is in favor of the buyer. The intent is hard to get at. It is concealed within the mind of the buyer, a secret to all the world. How then are we to get at this intent. Kent says: "Intent may be made not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves but decisive evidence in given cases of a fraudulent design."[16] The old maxim is "*actus non facit reum nisi meus sit rea.*" Bishop sug-

[11] Anderson's Law Dict. 882; and cases cited in note 4, Higler v. People, 44 Mich. 303. In this case the court cited the old English case, Regina v. Hamilton, 1 Cox, C. C. 244, 9 Q. B. 271.

[12] Hall v. Johnson, 41 Mich. 289.

[13] Citing 2 Parsons on Contracts, 267; Frenze v. Miller, 37 Ind. 1, 10 Am. Rep. 62; Seely v. Price, 14 Mich. 541; Bristol v. Braidwood, 28 Mich. 192; Whiting v. Hill, 23 Mich. 404; Mizner v. Russell, 29 Mich 231.

[14] State v. Mutsch, 15 Pac. Rep. (Kan.) 251.

[15] 75 Mich. 188.

[16] Kent Com. 2, 484.

gests "that there is but one criterion by which the guilt of man is to be tested. It is whether the mind is criminal." How to prove this intent in the case of a false pretense is the question. It must of necessity be by facts extrinsic. Suppose the buyer purchases goods largely in excess of the needs of his trade. Why does he do it if not with the design to defraud the vendor. If he makes large purchases when in an insolvent condition, knowing that he will unable to pay, this certainly is a strong indication of guilt. If while in an insolvent condition he offers for sale goods below cost and makes no application of the proceeds in payment of his debts, a fair inference would be that his intention was bad. The placing of an incumberance upon his stock in favor of a relative. Reckless expenditure and the same recklessness in advertising and such like acts on the part of the vendee are strong indications as bearing on the question of intent. Although fraud cannot be presumed, it may be assumed from evidence of such facts as would be inconsistent with any other theory. A writer on the subject says "a mere inference is rarely regarded as strong enough to justify an absolute conclusion of the mind." True as to the trial upon a criminal charge, but the inference from facts negativing any other fair conclusion, is often the rule when it comes to ascertaining the intent which existed in the mind of the buyer of goods, in an action at law when he is charged with fraudulent intent. A preponderance of evidence is the thing sought to justify a conviction of the fraud charged in the civil action for damages. It has been decided in several States that if a merchant insolvent, buys merchandise, and then so disposes of it as to deprive himself of the means to pay for it, it would be assumed from these circumstances that he did not intend to pay for it.[17] The disposition the buyer makes of goods is a strong indication of what intent he had when he purchased them. A denial of an actual intent to defraud will not avoid the consequences of an act which is in effect a fraud.[18] As bearing on the question of intent the Michigan Supreme Court in the case of Ross v. Miner,[19] say "fraud is seldom capable of direct proof. It must be established by facts and circumstances taken together, and the natural inferences to be drawn therefrom, which will satisfy the ordinary unbiased man either as a juror, or outside of the jury box, that it exists. It was competent to show the whole business of M and A as far as it could be done, after they came to Detroit and up to the time of the assignment. It was proper to this end to show how many goods they purchased on credit, and of whom they purchased them, and whether the parties with whom they dealt had any knowledge of the alleged indebtedness of the firm to N. This could be followed up by showing what their assets were when they came to Detroit; how much money, if any, they put in the business thereafter, how many goods were sold, and what was done with the proceeds thereof, and what were their assets and liabilities upon the day of their failure, as tending to showing that their business in Detroit was but a scheme to acquire goods with which to liquidate an old debt, even if it was a valid one, to N or as rebutting such a presumption. Great latitude in the search for fraud must necessarily be allowed, or the ends of justice are liable to be defeated. If the debt to N was a valid one, and their business in Detroit are honest venture such an investigation, with the explanation defendants themselves could furnish could not harm them. On the other hand, if they bought the goods of plaintiffs with the intent never to pay for them but to swallow them and all their other property by this mortgage to N, even though the debt were a valid one, it was fraud."

Rescinding the Contract.—When a contract has been entered into in pursuance of false representations, the vendor may elect to treat the contract as either valid or void. But if with a knowledge of the false representations he chooses to treat it as valid, he is afterwards estopped from assuming to treat it as if void, because fraud cannot be predicated upon facts which have been assented to. We start with the general proposition, or better, a proposition generally assented to by the courts of this country, that a vendor may protect himself against the fraud of an insolvent vendee who has not paid and does not mean to pay by a rescission of the contract of sale,[20] and the vendor wishing to have this protec-

[17] Wright v. Brown, 67 N. Y. 1; Talcott v. Henderson, 31 Ohio St. 162.

[18] Newlove v. Callaghan, 86 Mich. 301.

[19] 67 Mich. 412.

[20] Doyle v. Wizim, 40 Mich. 164.

tion against the fraud practiced upon him must act promptly. A defrauded party has but one election to rescind and must exercise that election with reasonable promptitude, after discovering the fraud. And when he once elects he must abide by his decision.[21] Delay in the rescission of a contract is evidence of an intention to waive or condone the fraud.[22] Dealing with the property as if the contract was binding is a waiver of the fraud.[23] In Dalton v. Thurston,[24] the court suggests that the mere fact of the purchaser having been in the habit of doing his business in a slipshod manner showing heedlessness or or incapacity, and where there is nothing to show that the business was carried on in any other than the usual manner, or in anything to show that the purchase was made in anticipation of failure, the fraudulent intent cannot be presumed even when the purchase is made a short time before assignment even the fact that he is deeply involved does not have the effect to render his purchase invalid, unless he purchases with no intent or expectation of paying; for if there be no dishonest mind or purpose, no fraud can result. The expectation of paying need only be based upon reasonable grounds.[25] The law permits the insolvent to keep his own counsel and struggle with his embarrassments so long as he has an honest hope and intention of overcoming them. In the case of Mitchell v. Worden,[26] the court held that the law does not make it the duty of the buyer to disclose to the seller his pecuniary circumstances even though they may be desperate, even though there has been a long period of mutual business relations between them, in which credit has been given on one side and punctually met on the other, so long as the buyer continues to carry on his business. Of course the fact that a purchaser is deeply involved when he purchases, and knows that such is the fact, is evidence from which, it may be inferred that he had no intention or expectation of paying.[27] A very general proposition of law is that a purchase made by one who is insolvent, and with the purpose not to pay is void, even though the buyer has not made false representations.[28] In the case of Smith v. Smith, above, the court say "an intention not to pay is dishonest, but it is not fraudulent. The law provides an action on the contract as the remedy for such dishonesty. And it is no more fraudulent to have such an intention at the time of the purchase than at the time when payment ought to be made. Such intention by itself is disregarded by the law for it can be set aside by the usual contract remedies. Nor does insolvency make a sale voidable after delivery. If such were the law, there is no calculating the suspicions and disputes which it would foment. If it were so the law of stoppage *in transitu* would be effectually abolished by one of a much more sweeping character. Nor does insolvency combined with an intention not to pay, for it is no more fraudulent in an insolvent than a perfectly solvent man, to have such an intention. The buyer's knowledge of his insolvency would be quite as dangerous a test of fraud, for it might always be inferred from the fact of insolvency, and from the presumption that every man is acquainted with his own affairs. If the fact of buying implies an assertion of solvency then every contract by a man in failing circumstances can be made fraudulent; for to this implied assertion, a jury might add the inference that he had investigated his affairs and knew his insolvency, or had not and knew his ignorance. And there might follow just as logically the inference of intention not to pay. Thus all the elements of fraud con-

[21] Dennis v. Jones, 44 N. J. Eq. 513; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Hordly v. House, 32 Vt. 179, 76 Am. Dec. 167; Bigelow on Frauds, 436, and he must restore any thing he has received under the contract. Woodbury v. Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Pangborn v. Ruemevapp, 74 Mich. 572.

[22] See Williamson v. N. Y. South. R. R. Co., 29 N. J. Eq. 311; Brown v. Mutual Ben. Life Ins. Co., 32 N. J. Eq. 809; Oakey v. Cook, 41 *Id.* 350; 2 Pom. Eq. Juris. Sec. 817; Baird v. New York, 96 N. Y. 567; Farlow v. Ellis, 15 Gray, 229.

[23] Bassett v. Brown, 105 Mass. 551; 1 Story's Eq. Juris., 13 Ed. 227; 2 Kent Com. 11 Ed. 637; Schiffer v. Dietz, 83 N. Y. 300; Dennis v. Jones, 44 N. J. Eq. 513.

[24] 15 Rhode Island, 418.

[25] See Commonwealth v. Eastman, 48 Am. Dec. 596; Hall v. Naylor, 75 Am. Dec. 269; cases there cited. Talcott v. Henderson, 27 Am. Rep. 501.

[26] 20 Barb. 253.

[27] Dalton v. Thurston, *supra.*

[28] Donaldson v. Farwell, 93 U. S. 631; Powell v. Bradlee, 9 Gill. & J. 220; Shipman v. Seymoure, 40 Mich. 283; Thompson v. Rose, 16 Conn. 71; Ayers v. French, 41 *Id.* 142; Nichols v. Michael, 23 N. Y. 264; Hennequim v. Naylor, 24 N. Y. 139; Deore v. Brander, 53 N. Y. 462; Wright v. Browne, 67 N. Y. 1; Halbrook v. Connor, 60 Me. 578; Bishop v. Small, 63 *Id.* 12; Stewart v. Emerson, 58 N. H. 301; *Contra,* Smith v. Smith, 21 Penn. St. 367; Backentoss v. Speicher, 31 *Id.* 324.

tained in the proposition under consideration may be inferred from the mere fact of a subsequent failure, and the contract is avoided for a constructive rather than an actual fraud." In Bell v. Ellis,[29] there is a dictum agreeing with the doctrine announced in Smith v. Smith, *supra*. Excepting these Pennsylvania cases we find the doctrine universal that the combined insolvency and intent not to pay with the fraudulent concealment of those matters, constitute such fraud as will annul the sale. The cases are uniform that mere concealment of insolvency will not suffice. And the mere concealed intent not to pay will not.[30] In Mulliken v. Miller,[31] a useful illustration is afforded as to what evidence of fraud by a purchaser will be sufficient to enable the vendor to annul the sale. It appeared that M through his agent purchased certain merchandise on credit and the day after its delivery made a general assignment to L for the benefit of creditors. As his liabilities were large and the assets small, the vendor, after demand, on the assignee, brought trover for the value of the merchandise. The court held that it was not necessary for the plaintiff to show a particular intent on the part of Miller to defraud in the particular transaction in question, that it was sufficient for the plaintiff to satisfy the jury of a general intent on his part to defraud by continuing to purchase on credit after he had become hopelessly involved. The court said "it may be that M, having become hopelessly insolvent had made up his mind to go on making purchases as usual intending not to pay for them, but to accumulate assets for his assignment. If with such mind and intention M had personally bought the merchandise there can be no doubt that the plaintiff would have had the right to disaffirm the sale for fraud and to reclaim the property the transaction would have clearly involved a preconceived design to purchase and not to pay, which has been repeatedly decided to be fraudulent."[32] To enable the vendor of goods to disaffirm the sale and to recover against the purchaser with notice, the concurrence of these facts must be shown, 1st, the purchaser must have been at the time of sale insolvent, or in failing circumstances; 2d, he must have had at the time a preconceived intention not to pay for the goods, or no reasonable expectation of being able to do so; and 3d, there must have been on his part an intentional concealment of these facts, or a fraudulent representation in reference to them.[33] Finally replevin is the usual action in all these cases where goods are fraudulently obtained by a vendee. In most cases possession of the goods is about all that remains to the defrauded vendor, and trover or any other proper action is seldom resorted to in these cases unless the goods are not in sight.

PERCY EDWARDS.

[29] 33 Cal. 630.

[30] 2 Parsons on Con., 366; Talcott v. Henderson, 27 Am. Rep. 516, note.

[31] A Rhode Island case reported in 27 Am. Rep. 515.

[32] Citing, Benjamin on Sales, Sec. 440; Stewart Emerson, 52 N. H. 301; Supin v. Marie, 6 Wend. 77; Ferguson v. Carrington, 9 B. & C. 59.

[33] LeGrand v. Eufailu, Nat. Bank, 81 Ala. 123, 60 Am. Rep. 140.

RIGHT OF PURCHASER—FALSE REPRESENTATIONS—CAVEAT EMPTOR.

ARMSTRONG V. WHITE.

Appellate Court of Indiana, Sept. 28, 1893.

A complaint in an action by a purchaser of land against his vendor, for damages for false representations, alleged that the statements as to the character and value of the land, and its productiveness, were false, to the vendor's knowledge, but that the plaintiff was ignorant thereof, being a physician, and did not visit the land, and relied on the representations: Held, that the rule "caveat emptor" applied, and plaintiff could not recover. Gavin, C. J., and Davis, J., dissenting.

REINHARD, J.: The appellant traded to the appellee a stock of drugs, and took in exchange therefor a tract of land. The appellant brought this action in the lower court for damages on account of alleged fraud in the trade of the land. The case comes here on the ruling of the court in sustaining a demurrer to the complaint. It is shown that the appellant resides in the city of Terre Haute, and the land is situated in the adjoining county of Sullivan. The alleged misrepresentations are as to the character, condition, and value of the land, and the adaptability of the soil to productiveness, etc. The complaint charges that the representations were false, and were known to be such by the appellee, when made, but that as to the facts thus represented the appellant was ignorant, and being a physician, and having patients at home, he could not, without inconvenience to himself, have gone and examined the premises, and informed himself of the truthfulness or falsity of such representations, and that, therefore, he relied upon the same, and believed them. We are of the opinion that the court committed no error in sustaining the demurrer. It has often been decided that such al-

legations as these will not support an action, though the seller knew the representations to be false when he made them, as in such cases the maxim "caveat emptor" applies. The matters affirmed in the alleged misrepresentations were open to inquiry, and could, with common prudence, have been investigated. As was said by the Supreme Court of Massachusetts: "Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmation concerning the value of the land, or its adaptability to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion, or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them, and, if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false, as the basis of his claim for damages, in reduction of the amount which he agreed to pay for the property." Gordon v. Parmelee, 2 Allen, 212. See, also, Parker v. Moulton, 114 Mass. 99; Brown v. Castles, 11 Cush. 348; Long v. Woodman, 58 Me. 49; Williams v. McFadden (Fla.) 1 South. Rep. 618. In the case last cited it was said by the Supreme Court of Florida: "A statement made by the vendor, which is tantamount to an estimate of opinion, such as value, condition, character, adaptability to certain uses, * * * is not actionable, unless the seller resorts to some fraudulent means to prevent the purchaser from examining the property." See, also, Shade v. Creviston, 93 Ind. 591; Hartman v. Flaherty, 80 Ind. 472; Cagney v. Cuson, 77 Ind. 494; Kerr, Fraud & M. (Amer. Ed.) p. 82. The rule is, of course, otherwise, where the representations are of facts peculiarly within the knowledge of the defendant, and other than mere belief or opinion, and the truth or falsity of which could not, with usual diligence, have been ascertained by the plaintiff. Huston v. McCloskey, 76 Ind. 38; Morse v. Shaw, 124 Mass. 59. It is also different where the purchaser resides at a great distance from the location of the property which forms the subject of the negotiations, or is prevented from examining it by the fraud of the seller. Harris v. McMurray, 23 Ind. 9. Nothing is disclosed in the complaint from which it appears that the appellant had not a reasonable opportunity of examining the land he traded for, and, if he was imposed upon, it was the result of his own folly,—a dilemma from which the courts cannot extricate him.

Error is further claimed in striking out a portion of the first paragraph of the complaint. The part striken out related to an alleged representation as to how much the appellee had been offered for the land. Had it remained in, it would have made the paragraph no stronger. The striking out was a harmless performance.

Judgment affirmed.

NOTE.—The ground of the dissent of two of the judges of the court on the question presented was substantially because the appellant was unacquainted with the real estate which was the subject of sale; that the land was situated forty or fifty miles from where he resided; that he had no means of ascertaining anything about the real estate except through appellee; that he was a practicing physician at the time the fraudulent representations were made, and that it was impossible for him to leave the city of his residence on account of sick patients, and that he was compelled to and did wholly rely upon the statements of appellee as to the kind, character, condition and location of the land, the quality and production of the soil, and the value thereof. The dissenting judges said, in effect, that whatever might be the rule in other States, the law was settled to their satification by the Supreme Court of Indiana to the effect that the injured party, under the circumstances disclosed, is entitled to relief against the fraud. Citing Jones v. Hathaway, 77 Ind. 14. The law pertaining to questions of deceit and false representation in the sale of real estate is well settled. The mere expression of an opinion, even in strong and positive language, is no fraud, though it be false. This is the rule because men's judgments are often governed by caprice. Pasly v. Freeman, 3 T. R. 51. A mere false assertion as matter of opinion which does not imply knowledge does not amount to a warranty. Every party reposes at his peril in the opinion of others when he has equal opportunity to form and exercise his own judgment. Saunders v. Hatterman, 2 Ired. (N. C.) 32. For the seller of land to assert to the buyer that it has a particular high value far above its real worth and to misrepresent as to its wonderful productiveness is no fraud. Credele v. Swindell, 63 N. Car. 305. The law does not conform to the rule of morals and allows a great deal of "lying in trade," when the assertions are merely puffing one's own goods, or depreciating those of another. It is no fraud for the vendor to impress strongly upon the buyer the profitableness of the trade and the good bargain which he will make. Sieveking v. Litzler, 31 Ind. 13. In the sale of land, to exaggerate the fertility of the soil as to productiveness, and the good quality of the land, is no fraud. Mooney v. Miller, 102 Mass. 217. In other words mere expression of judgment or opinion does not amount to a warranty. Payne v. Smith, 20 Ga. 654; Lehman v. Shackleford, 50 Ala. 437; Ellis v. Andrews, 56 N. Y. 83; Bristol v. Braidwood, 28 Mich. 191; Tucker v. Downing, 76 Ill. 71. It was held in one State that the false statement that certain lands had large deposits of oil within them and were therefore of great value was merely a matter of opinion. Holbrook v. Connor, 60 Me. 576. But this doctrine is not considered correct by many courts and can hardly be the rule. Bradley v. Poole, 98 Mass. 169. A buyer of land has a right to rely upon the positive statement of the vendor as to the quantity of the

land bought. Hill v. Brower, 76 N. Car. 124. The general rule is that if the means of knowledge be equally available to both parties and the subject of the negotiation be equally open to the inspection of both, the party complaining must avail himself of such knowledge so as to avoid the injury, unless there was a warranty of the facts. Slaughter v. Gerson, 13 Wall. 379; Brown v. Leach, 107 Mass. 364; Salem Rubber Co. v. Adams, 23 Pick. (Mass.) 256. It has been held that a party may rely upon the express and positive representation of another though the means of information are near at hand. Mattock v. Todd, 19 Ind. 130. But these express representations must be such as would naturally prevent a man of prudence from making further investigation. Kiefer v. Rogers, 19 Minn. 32; Porham v. Randolph, 6 How. (Miss.) 435; Holland v. Anderson, 38 Miss. 55.

JETSAM AND FLOTSAM.

POWERS AND LIABILITIES OF MILKMEN.—A novel question of law is soon to be passed on by the Massachusetts Supreme Court. It is this: Has a milkman the right to wake up a customer in order to present a bill? In other words, is he technically guilty of an assault? The defendant had been accustomed to leave milk at an early hour at the plaintiff's house. At intervals he had entered the plaintiff's sleeping room for the purpose of collecting his bill while the debtor was in bed. The evidence does not show that the plaintiff was reluctant to settle the claims against him. The method of collection was merely a usage to which he submitted. But after a while he grew tired of it, and notified the milkman to discontinue the practice. One morning however the defendant, wanting his money and not finding the plaintiff up, made his way again to the room, and aroused plaintiff by shaking his shoulder. Then the defendant presented his bill. It happened that the customer had just fallen asleep after a night of sickness, and he showed his resentment by bringing suit for assault against his creditor. The lower court entered judgment for the defendant, but the plaintiff is not satisfied, and wishes it to be settled once for all whether a milkman can awaken a customer and demand that he cancel a debt at an unseemly hour.

MANDAMUS BY STUDENT TO OBTAIN DEGREE.—We trust it may not be necessary in this country to look into the law as to whether a collegiate faculty can be compelled by *mandamus* to grant a degree to a contumacious student, but it will be of interest to note the decision of People v. *ex rel.* O'Sullivan v. New York School, decided in the Supreme Court of New York. As we learn from the *American Law Review*, the substance of the decision was that colleges are to be governed by the faculty, and not by the students, and that when a student undertakes to dictate to the faculty as to the course to be pursued in the condnet of the institution, and accompanies his dictation with a threat, the faculty may refuse his degree for which he has passed a satisfactory examination, and to which he is otherwise entitled, by way of mere discipline; but while the courts uphold this action in refusing a diploma to the recalcitrant student, they expressed the opinion that he was entitled to a certificate of attendance, and of having passed a satisfactory examination.—*Canada Law Journal.*

BOOKS RECEIVED.

The American Digest (Annual 1893), being Volume 7 of the United States Digest Third Series Annuals, also the Complete Digest for 1893. A Digest of all the Decisions of the United States Supreme Court and all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri, and Colorado, U. S. Court of Claims, Supreme Court of the District of Columbia, etc., as Reported in the National Reporter System and elsewhere from September 1, 1892, to August 31, 1893. With notes of English and Canadian Cases, Memoranda of Statutes, Annotations in Legal Periodicals, etc. A Table of Cases Digested, and a Table of Cases Overruled, Criticised, Followed, Distinguished, etc., during the Year. References to the State Reports given by an Improved Method of Topical Citation. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn. West Publishing Co., 1893.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE.—In an application for accident indemnity, when the applicant states his income truly, but the agent, without his knowledge or consent, increases the amount so as to place the applicant in another class of assured, an agreement that the society shall not be bound by any statement made to, or knowledge possessed by, the agent not written in the application, and that such person is the applicant's agent to e ter his answer, does not relieve the insurer of its estoppel to contest the policy.—HOWE V. PROVIDENT FUND SOC., Ind., 34 N. E. Rep. 830.

2. ADVERSE POSSESSION.—Where a person obtains and holds possession of land under an agreement with another, who is in possession by the assent of the true owner, and it does not appear what the arrangement was between the owner and the person in possession, the former cannot claim title by adverse possession, since the presumption is that he and the one under whom he claims held as tenants.—BUTLER V. BERTRAND, Mich., 56 N. W. Rep. 342.

3. ADVERSE POSSESSION—Conflicting Patents.—Where a junior patent interferes with a senior, and the senior patentee is not in possession, the junior patentee's actual possession of a part of the interference, and claim to the extent of his patent boundary, is an adverse possession of the whole interference.—WHITLEY COUNTY LAND CO. V. LAWSON, Ky., 23 S. W. Rep. 369.

4. APPEAL — Affirmance — Bond.—Under Gen. Laws Called Sess. 22d Leg. p. 44, art. 1404, prescribing as the condition of an appeal bond "that appellant shall prosecute his appeal with effect, and, in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment,"

a bond conditioned that appellant "shall prosecute this appeal with effect, and, in case the judgment of the said Court of Civil Appeals shall be against the defendants herein, they shall perform the judgment," etc., of said court, and pay damages awarded, is not so defective as to deprive the Court of Civil Appeals of jurisdiction to affirm the judgment below on motion of the appellee.—DAVIS v. ESTES, Tex., 23 S. W. Rep. 411.

5. APPEAL—Bill of Exceptions—Stipulation of Facts.—In order for this court to examine the evidence embraced in a stipulation of facts between parties to a case tried in the district court, such stipulation must be embodied in the bill of exceptions.—PERRY v. STATE, Neb., 56 N. W. Rep. 315.

6. APPEAL—Parties.—On appeal by plaintiff from a foreclosure decree declaring interests in certain defendants not subject to the mortgage, the mortgagor and his wife, the principal defendants foreclosed, must be joined as appellees, and a failure to bring them in is not waived by joinder in error.—GARSIDE v. WOLF, Ind., 34 N. E. Rep. 810.

7. APPEAL—Service—Amendment of Record.—Under Sayles' Civil St. arts. 1411, 1412, providing that the transcript on appeal shall contain the citation and return, if the pleadings or judgment do not show an appearance in person or by attorney, it is not enough that the judgment recite that service was had.—MCMICKLE v. TEXARKANA NAT. BANK, Tex., 23 S. W. Rep. 428.

8. APPEAL — Writ of Error.—Where appellee is entitled to an affirmance, on a certificate, of the judgment appealed from, because of appellant's failure to file the transcript in time, such right cannot be defeated by appellant bringing error on the judgment after such failure.—DAVIDSON v. IKARD, Tex., 23 S. W. Rep. 879.

9. ARSON—Malice.—On a trial for arson an instruction that "malice, within the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive," is correct; Pen. Code, § 7, subd. 4, providing that "the words 'malice' and 'maliciously' import a wish to vex, annoy or injure another person, or an intent to do a wrongful act."—PEOPLE v. DANIELS, Cal., 34 Pac. Rep. 234.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—The assignment law (Comp. St. ch. 6) does not deprive insolvent debtors of their common-law right to prefer creditors. The law merely prohibits preferences (with certain exceptions named in the act) when made in the assignment itself, and preferences made within 30 days before an assignment actually executed, with notice upon the part of the creditor preferred that the debtor was then insolvent or contemplating insolvency.—KAVANAUGH v. OBERFELDER, Neb., 56 N. W. Rep. 316.

11. ATTACHMENT FOR DEBT NOT DUE.—An action can be maintained on a claim before it is due only in the exceptional cases enumerated in section 237 of the Code.—CAULFIELD v. BITTINGER, Neb., 56 N. W. Rep. 302.

12. BOND — Construction.—A bond payable to "B & Co., their successors or assigns," recited that it was given to enable the obligors to borrow money "from B & Co.," and as "a continuing security for any money" which the obligors owe or at any time might owe "B & Co., their successors and assigns," and was conditioned on the payment to the "obligees, their successors or assigns," of all advances made by "said obligees, their successors or assigns," it being expressly understood not to require "said obligees, their successors or assigns," to advance any money whatever: Held, that the bond secured advances made by or debts due to B & Co. as the firm then existed, and did not secure advances made by a firm succeeding B & Co. under the same name, after the death of one of its members.—BENNETT v. DRAPER, N. Y., 34 N. E. Rep. 791.

13. BONDS — Delivery — Filling Blanks.—The attorney for an attachment debtor presented to defendants for signature as sureties a redelivery bond, blank as to the specific description of the property attached and its value. Defendants signed the bond and justification annexed, and gave the paper to the attorney, who signed the jurat as notary. He thereafter filled the blanks, and delivered the bond: Held, that defendants had made him their agent to fill the blanks, and were estopped to deny his authority.—PALACIOS v. BRASHER, Colo., 34 Pac. Rep. 251.

14. CARRIERS — Passengers — Excursion Tickets.—An auction sale of land in a distant city had been advertised by the owners of the land. A railroad company placed excursion tickets to the city and return in the hands of its agents, good for a certain limited time, at reduced rates: Held, that a purchaser of one of those tickets, who used all diligence after the sale to make the return trip, could not be lawfully expelled from one of the railroad company's trains, though the limited time had expired.—TEXAS & P. RY. CO. v. DENNIS, Tex., 23 S. W. Rep. 400.

15. CARRIERS OF LIVE STOCK — Delay in Delivery.—Where a shipper of live stock enters into a contract with defendant's freight agent at about 4 or 5 o'clock in the afternoon for the shipment of the stock, and for its delivery to him at the point of destination, a few miles distant, on the same night, a casual statement to the shipper made by the conductor of the train a few minutes before it started, and after the stock had been loaded on the car, that he did not think that it would be unloaded that night, does not change the contract, nor impose on the shipper the duty of stopping the transportation; and he is entitled to damages for injuries suffered by the stock owing to its exposure over night to the enclement weather.—CORBETT v. CHICAGO, ST. P. M. & O. RY. CO., Wis., 56 N. W. Rep. 327.

16. CARRIERS OF PASSENGERS — Boarding Moving Train.—A railroad company is liable to a passenger who is injured while getting on a moving train; he having been induced to leave it by the assurance of the conductor that it would stop at the station five minutes, and the conductor having, before the expiration of that time, given the signal to start, with knowledge that the passenger had left the train, and while he was so far away that he could not board the train before it started.—FOREMAN v. MISSOURI PAC. RY. CO., Tex., 23 S. W. Rep. 422.

17. COMPOSITION WITH CREDITORS — Preferences.—Where defendants entered into a composition agreement with their creditors, among whom were plaintiffs, and partly performed the same, the fact that plaintiffs were given a preference over other creditors by a collateral agreement whereby the composition was not to affect certain collateral security held by them does not entitle defendants to refuse complete performance of the composition agreement, and also, because of the composition, repudiate the original debt.—SHINKLE v. SHEARMAN, Ind., 34 N. E. Rep. 838.

18. CONSTITUTIONAL LAW—Railroad Companies—Killing Stock.—Gen. St. ch. 93, §§ 13, 14, as amended by Sess. Laws 1885, p. 304, and Sess. Laws 1891, p. 21 (known as "Railroad Stock-Killing Acts)," which fix the amount to be paid for certain kinds of animals by an arbitrary schedule of prices, and provide for the fixing of the value of other animals by appraisers without allowing proof of actual value, and which make the company absolutely liable, are unconstitutional, in that under them a railroad company may be denied the equal protection of the laws, and deprived of its property without due process of law.—RIO GRANDE WESTERN RY. CO. v. VAUGHN, Colo., 34 Pac. Rep. 264.

19. CONTRACTS — Consideration.—An agreement to extend a note on payment of the accrued interest is without consideration.—HELMS v. CRANE, Tex., 23 S. W. Rep. 392.

20. CONTRACT—Rescission.—The fact that a vendor of hotel property misrepresented its value and its daily earning capacity to the vendees, who had no experience or knowledge in regard to such property, is no ground for rescission of the sale, where they purchased after having opportunity to ascertain for themselves

the value of the property, and did in fact examine it.—PEAK v. GORE, Ky., 23 S. W. Rep. 357.

21. CORPORATION—Action to Dissolve for Insolvency.—How. St. ch. 281 (entitled "Proceedings against Corporations in Chancery"), § 8155, provides that whenever any incorporated company shall have remained insolvent for one year, or for one year shall have neglected to pay its debts, it shall be deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved: Held that, if such statement authorizes a bill in chancery to dissolve a corporation for insolvency, it does not abrogate the common-law rule that the State must bring it through its attorney general, and authorize such bill to be exhibited by a stockholder.—HEAP v. HEAP MANUF'G CO., Mich., 56 N. W. Rep. 349.

22. CORPORATIONS—Agreement of Stockholders.—An agreement entered into by the solvent shareholders of an embarrassed corporation, that they will severally contribute to raise a fund to pay the corporate liabilities, creates a valid obligation; and, if the share to be contributed by each is not expressly fixed by the terms of the agreement, each should contribute in the proportion that the number of shares of stock owned by him bears to the shares held by all the contributors.—STERLING WRENCH CO. v. AMSTUTZ, Ohio, 34 N. E. Rep. 794.

23. CORPORATIONS—Assumption of Debts of Promoters.—Where the promoter of a corporation is indebted to plaintiff for procuring a *bonus* for the corporation, the latter, on its organization, on accepting the *bonus* with knowledge of the claim for services, assumes the indebtedness also.—WEATHERFORD, M. W. & N. W. R. CO. v. GRANGER, Tex., 23 S. W. Rep. 425.

24. CORPORATIONS — Forged Issue of Stock. — The president of a company took a blank certificate of stock, signed by a former president, since deceased; dated it back seven years; forged the signature of the then treasurer, also deceased; signed his own name, as the then secretary and transfer agent; and filled in his own name as stockholder. This instrument he used as collateral in obtaining a loan: Held that, all three signatures being in law forgeries, his office as president clothed him with no such apparent authority as to make the company liable on the certificate.—MANHATTAN LIFE INS. CO. v. FORTY-SECOND & G. ST. FERRY R. CO., N. Y., 34 N. E. Rep. 776.

25. COUNTY AUDITORS — Fee. — Rev. St. 1881, § 4293, requiring the county auditor to give notice of the proceedings on the report of drainage viewers by publication, and posting written notices, does not authorize the auditor to charge for these services, and the rule against "constructive fees" applies.—ELEY v. MILLER, 34 N. E. Rep. 836.

26. COURTS—Jurisdiction over Non-residents.—Where non residents, who are served, where they reside, with summons in a personal action, voluntarily appear and answer, they thereby waive objection to jurisdiction, and the court may set aside an order made on the previous day of the same term, discharging such non-residents from the suit.—BARTLEY v. CONN, Tex., 23 S. W. Rep. 382.

27. CRIMINAL EVIDENCE. — The record of a chattel mortgage is admissible in evidence against defendant where the note had been paid and surrendered with the mortgage to defendant, and defendant's counsel having been served with notice to produce them, on being asked what answer he wishes to make to the notice, says, "Not any."—STATE v. CHASE, Iowa, 56 N. W. Rep. 275.

28. CRIMINAL EVIDENCE.—Where defendants, who are charged with jointly committing a crime, deny that they ever met before their arrest, the prosecution may show that they were seen together at several different places during a period of nearly two years before the crime was committed.—STATE v. GADBOIS, Iowa, 56 N. W. Rep. 272.

29. CRIMINAL EVIDENCE — Accomplice Testimony — Corroboration.—Testimony of a woman that she gave to defendant, who was charged with being her accomplice, money which she admitted having stolen from one G, and that defendant had advised her to "work" some money out of G, is not corroborated by evidence that, when the woman was arrested for the larceny, defendant asked to see her, told the sheriff that he had arrested the wrong woman, and told the under-sheriff that he did not know her, though there is also evidence, which defendant contradicted, that the woman had been his mistress.—PEOPLE v. KOENING, Cal., 34 Pac. Rep. 238.

30. CRIMINAL EVIDENCE — Homicide — Character of Defendant.—It is reversible error to instruct the jury, in a criminal case, that "evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong," as it invades the province of the jury. It is for them, and not the court, to determine what weight shall be given to evidence of good character.—VINCENT v. STATE, Neb., 56 N. W. Rep. 320.

31. CRIMINAL LAW—Change of Venue.—Where defendant has had a change of venue, and, after disagreement of the jury, has moved to have the cause remanded to the original county, which is done without objection by the State, and at the next term, in the latter county, has moved to have the order for change of venue set aside, which is done, and he is tried and convicted, he cannot move for arrest of judgment for lack of jurisdiction, under Gen. St. ch. 12, which forbids more than one change of venue in each case.—HOURIGAN v. COMMONWEALTH, Ky., 23 S. W. Rep. 355.

32. CRIMINAL LAW — County. — Mills' Ann. St. § 699, providing that costs in criminal cases shall be paid by the county when the defendant shall be convicted and hall be unable to pay them, and when defendant is acquitted, "unless the prosecuting witness be adjudged to pay them," refers only to the costs of the prosecution, and not to those of defendant.—BOARD OF COM'RS OF FREMONT COUNTY v. WILSON, Colo., 34 Pac. Rep. 265.

33. CRIMINAL LAW — Extradited Prisoner. — Where a person is indicted for a certain offense, and extradited from another State, he may be indicted, held, and tried for another offense, without first having a reasonable opportunity to return to the State whence he was extradited.—STATE v. KEALY, Iowa, 56 N. W. Rep. 283.

34. CRIMINAL LAW — Kidnapping. — Pen. Code, § 211, provides that one who wilfully seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within the State, is guilty of kidnapping: Held, that defendant was not guilty of such offense, where he procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time.—PEOPLE v. CAMP, N. Y., 34 N. E. Rep. 755.

35. CRIMINAL LAW—Misconduct of Juror.—An affidavit of a juror, in support of a motion to set aside a verdict of conviction, stated that on several occasions while the trial was pending, as affiant was leaving the court room during a recess of the court, he was engaged in conversation by certain witnesses for the State, who commended the prosecuting witness and condemned defendant; that affiant did not begin or invite the conversation, and endeavored to turn it to some other topic. But it was not claimed that the prosecution was responsible for the conduct of such witnesses: Held, that the court did not err in refusing to set aside the verdict.—STATE v. ALLEN, Iowa, 56 N. W. Rep. 261.

36. CRIMINAL LAW—Oath of Witness.—A refusal of the court to administer to Chinese witnesses an oath other than the usual form, as authorized by Code Civil Proc. §§ 2095, 2096, is not reversible error; such sections not being mandatory, and it not appearing that the witnesses regarded some other form of oath more binding

than the usual form.—PEOPLE v. GREEN, Cal., 34 Pac. Rep. 231.

37. CRIMINAL LAW—Possession of Stolen Property.—On a prosecution for robbery, an instruction that defendants' possession of the stolen property shortly after the crime, and their failure to account for such possession, are circumstances to show their guilt, and that they were bound to xplain the possession to remove its effect, is not error where the court has also charged that such possession is not of itself sufficient to warrant a conviction, but merely a circumstance to show guilt.—PROPLE v. ETTING, Cal., 34 Pac. Rep. 237.

38. CRIMINAL LAW — Receiving Stolen Property.—Where the information on which defendant was tried charged that he received stolen property "from some person to the district attorney unknown," and the evidence for the prosecution showed that before the information was prepared the district attorney was informed as to who stole the property, and from whom it was received by defendant, the variance is fatal.—SAULT v. PEOPLE, Colo., 34 Pac. Rep. 263.

39. CRIMINAL LAW—Threats.—An indictment charging defendant with having verbally threatened that "it would not begood" for prosecutrix to institute bastardy proceedings against him, with intent to compel her, against her will, not to institute such proceedings, does not charge an offense under Code, § 3871, which makes it a crime for any one to threaten to "accuse another of crime, or to do an injury to the person or property of another," with intent to compel the person so threatened to do an act against his will.—STATE v. MCGLASSON, Iowa, 56 N. W. Rep. 293.

40. DEATH BY WRONGFUL ACT—Conflict of Laws.—An action for injuries causing death will not lie, though the death occurred within the State, unless the law of the jurisdiction where the injuries were received recognizes such action.—DE HAM v. MEXICAN NAT. RY. CO., Tex., 23 S. W. Rep. 381.

41. DEPOSITIONS — Objections Waived. — Where a certificate to a deposition is insufficient, or the deposition is defective in any other respect that can be remedied by retaking it, and no motion to suppress it is made, objection thereto is waived, and cannot be made when the deposition is offered in evidence on the trial.—AMERICAN PUB. CO. v. C. E. MAYNE CO., Utah, 34 Pac. Rep. 247.

42. DIVORCE—Cruelty—Evidence.—In a suit by a wife for divorce on the ground of "extreme and repeated cruelty," the evidence showed no acts of personal violence except one push, which did not injure her, or leave any marks on her person. There was evidence that the husband was disagreeable in his manners, and that he did not furnish his wife with all the money she desired for living expenses; but it also appeared that he had spent $3,000 in buying a house, which was deeded to her: Held, that the evidence was not sufficient to sustain a decree of divorce.—FIZETTE v. FIZETTE, Ill., 34 N. E. Rep. 799.

43. DIVORCE— Vacation of Decree.—In the petition it is alleged that the defendant therein, plaintiff's husband, in the year 1878 procured a decree of divorce in this State by means of fraud and perjured testimony. At said time, and until recently, the plaintiff resided in the State of Pennsylvania. That the only service upon her was by publication in a local newspaper, and that she was not aware of the whereabouts of her husband, or of said action or decree, until the time of the filing of her petition, 11 years later: Held, to state a cause of action, since the remedy by petition for a new trial under the Code is inadequate, and that the court which allowed the decree may, in the exercise of its general equity powers, vacate it upon proper showing of fraud and imposition.—SMITHSON v. SMITHSON, Neb., 56 N. W. Rep. 300.

44. EASEMENTS — Right of Way. — M conveyed to plaintiff, by duly recorded deed, a right of way through his land, in consideration for which plaintiff was to erect and maintain a fence on the west line thereof. By subsequent parol agreement plaintiff built the fence on the east line, and used the easement continuously thereafter till M's death: Held, that plaintiff's failure to erect the fence on the west line did not defeat his right of way as against defendant, who purchased from M's executor the land through which it passed, where such purchaser was bound with actual notice that it was being used under conditions other than these specified in the deed.—PETERSON v. PIERSON, Iowa, 56 N. W. Rep. 290.

45. ESTOPPEL.—Where a railroad company builds a road and operates it for 11 years on land to which it has no title, the mere fact that the owner knew and did not object to such occupation does not show assent on his part, and, in the absence of any proof that he did assent to such occupation, he is entitled not only to the value of the land estimated as of the date of the first entry by the company, but also to its rental value during the time of such occupancy.—CHILDS v. KANSAS CITY, ST. J. & C. B. R. Co., Mo., 23 S. W. Rep. 373.

46. EVIDENCE.—Copies of letters written by plaintiff to defendant, which had been read on a former trial of the case without objection, and are on file with the papers, are admissible in evidence, where the originals are in defendant's possession, and notice was given to defendant on the trial to produce them.—BATTAGLIA v. THOMAS, Tex., 23 S. W. Rep. 385.

47. EVIDENCE.—In an action by an executor on a note, it appeared that decedent and one of the makers of the note owned jointly the stock in a corporation. The assets of the corporation were sold and applied by decedent, who held all the stock but one share to his own use: Held, that the ledger of the corporation, not being a book of original entry, was inadmissible to show payment of the note by such sale.—JONES v. HENSHALL, Colo., 34 Pac. Rep. 254.

48. EXECUTOR.—The general rule is that an executor cannot, by virtue of his general powers as such, make any new contract which will bind the estate, though in form made in his representative capacity. The only effect is to bind himself personally, and it is immaterial how he describes himself.—BROWN v. FARNHAM, Minn., 56 N. W. Rep. 352.

49. EXPRESS COMPANIES—Contract of Shipment.—A bill of lading given by an express company, undertaking to forward to point nearest destination reached by the company (which was the point of destination,) subject to condition that the company should not be liable except as forwarders only within their own line of communication, does not fix the route of shipment over the company's line, but leaves the company free to choose the route.—WELLS, FARGO & CO'S EXPRESS v. FULLER, Tex., 23 S. W. Rep. 412.

50. GARNISHMENT — Mortgagee of Chattels.—Under Rev. St. § 2768, which provides that, "from the time of the service of the summons" on the garnishee, he shall stand liable to plaintiff to the amount of the property, etc., "in his possession or under his control," belonging to the principal defendant, a chattel mortgagee cannot be held liable, as garnishee, for any goods of which he had taken possession under his mortgage, but which had passed out of his possession or control several months before service of the garnishee summons; and it is immaterial whether the mortgage was valid or invalid, or the mortgagee's possession lawful or unlawful, as against the creditors instituting such garnishee proceedings.—SPITZ v. TRIPP, Wis., 56 N. W. Rep. 330.

51. GIFTS INTER VIVOS—Delivery.—A father, desirous of making an antemortem settlement of all his notes and bonds on his children, selected one of the sons, to whom he delivered the property, with direction to first equalize the children for advancements made, and then divide the remainder equally among them. All the notes and bonds regarded as solvent were accordingly distributed among the children during the father's lifetime, and the balance was by mutual consent of the children left in the son's hands for collection and subsequent distribution: Held that, by thus

exercising dominion over the property, the children not only signified an acceptance of the gift, but constituted the son as their agent for the collection and distribution of the balance, thus completing the delivery to them of the undistributed portion, and that, therefore, the death of the father before final distribution did not defeat the gift even as to the undistributed portion, nor revoke the son's authority to proceed with the collection and distribution.—MARTIN V. MCCULLOUGH, Ind., 34 N. E. Rep. 819.

52. GUARDIAN AND WARD—Conveyance of Ward's Reality.—Under Act Tex. May 20, 1848, making it the duty of a guardian to take care of and manage his ward's estate as a prudent man would his own, a guardian had a right to employ a person to hunt up and locate her wards' ancestor's head-right certificate, in consideration of an interest in the land located, without special authority from the Probate Court.—ELLIS V. STONE, Tex., 23 S. W. Rep. 405.

53. HUSBAND AND WIFE—Community Property Rents. —A conveyance by husband and wife of the wife's separate real estate to a trustee, to apply the rents and profits to the support of the wife, is a withdrawal of the rents from the community estate.—SHEPFLIN V. SMALL, Tex., 23 S. W. Rep. 432.

54. INSTRUCTIONS — Waiving Objections.—It is the duty of the court, on its own motion, to state the issues as presented by the pleadings to the jury. If, however, it fails to do so, a request to that effect must be made, and, upon the failure, an exception taken. If no exceptions are taken, and the objection not assigned in the motion for a new trial, it will be deemed waived.—BARNEY V. PINKHAM, Neb., 56 N. W. Rep. 323.

55. INSURANCE — Action — Limitation.—Under a provision in a policy of insurance requiring an action for the recovery of any claim to be brought "within 12 months after the fire," the time for bringing the action begins to run, not from the date when the loss is ascertained or established, but from the date of the fire, unless the insurer has waived the limitation, or estopped himself from insisting thereon.—HART V. CITIZENS' INS. CO., Wis., 56 N. W. Rep. 332.

56. INSURANCE—Conditions—Fire Proof Safe.—Under a condition in a fire insurance policy that the insured will keep his books in a "fire-proof safe," the insured complies with the letter and spirit of the condition when he puts the books in a safe of the kind generally known as fire-proof, and does not by this clause warrant the safe to preserve the books.—KNOXVILLE FIRE INS. CO. V. HURD, Tex., 23 S. W. Rep. 393.

57. INTOXICATING LIQUOR — Local Option.—Under Pub. Acts 1889, No. 207, § 14, relating to local option, and requiring the clerk of the board of supervisors to publish the resolution of prohibition in a newspaper "to be designated by the board," the paper in which the resolution is to be published must be designated by the board adopting the resolution, though the county printing has already been let to a certain newspaper.—MORAN V. DARBY, Mich., 56 N. W. Rep. 347.

58. INTOXICATING LIQUORS—Minor.—Where a minor is permitted to enter and remain in a retail liquor dealer's place of business, such dealer and his bondsmen are liable to the penalties imposed by Acts 1887, p. 59, regardless of whether the owner or his agents in charge of such place believed, or had reason to believe, that such minor was over 21 years old.—STATE V. MEYER, Tex., 23 S. W. Rep. 427.

59. INTOXICATING LIQUORS — Petition for License—Hearing.—Due notice having been published for the full time fixed by the statute, precedent to the hearing of an application for a license to sell liquors, the village board, before which such application is pending, has jurisdiction of the subject-matter, and, in case a remonstrance has been filed within the statutory time, should fix an hour of some subsequent day for hearing the application and remonstrance.—HOLLEMBAEK V. DRAKE, Neb., 56 N. W. Rep. 296.

60. INTOXICATING LIQUORS—Retail Dealer—Bond.—In an action to recover statutory penalties on the bond of a retail liquor dealer, in which the breach alleged is that such dealer permitted a minor to enter and remain in his place of business, it is no defense that such minor was a partner in the business, where he is not a party to the bond.—DRAKE V. STATE, Tex., 23 S. W. Rep. 398.

61. JUDGMENT.—An order denying a motion for a new trial is not final in such a sense as to constitute a final judgment, nor is a mere judgment for costs.—SMITH V. JOHNSON, Neb., 56 N. W. Rep. 323.

62. JUDGMENTS — Direct and Collateral Attack.—An action to vacate a default judgment on the ground that no jurisdiction was acquired of defendant, service having been only by publication, while defendant was not a non-resident, though the record contained the proper affidavit as to non-residence, is a direct attack on the judgment when fraud is alleged, but otherwise is collateral.—THOMPSON V. MCCORKLE, Ind., 34 N. E. Rep. 813.

63. JUDGMENT - Foreclosure of Mortgage—Deficiency. —2 Comp. Laws, § 3460, provides that there shall be but one action for any debt secured by mortgage; and, where it appears by the return of the officer making a sale under the decree that there is a balance still due, a judgment may be entered against defendant personally liable, and an execution may issue therefor: Held, that an execution cannot issue for any deficiency on a mortgage sale until a judgment is entered therefor after the return of the officer.—RUSSELL V. HANK, Utah, 34 Pac. Rep. 245.

64. LANDLORD AND TENANT—Forfeiture of Lease.—In an action seeking a forfeiture of a lease providing that the same should at once terminate, without notice, on a failure to pay the rent when due, an allegation that "plaintiff, just before sunset, duly demanded payment of the amount due on the premises," shows a sufficient demand for the rent to terminate the lease.—TAYLOR V. BRICE, Ind., 34 N. E. Rep. 833.

65. LIBEL—Defamation of Character—Justification.— The plaintiff's action was for a libel. The defense was justification. On the trial of the action in the Court of Common Pleas, that court, over the defendants' objection, permitted the plaintiff to give in chief to the jury evidence of his good character. The Circuit Court, solely on account of this ruling of the Court of Common Pleas, reversed the judgment, and remanded the cause for a new trial: Held, that the Circuit Court did not err.—BLAKESLEE V. HUGHES, Ohio, 34 N. E. Rep. 793.

66. LIMITATION OF ACTIONS — Part Payment.—Part payment by a county treasurer of a debt due by him for funds collected, and not paid over to his successor, will revive his own liability on his official bond, and not merely his personal liability as on his implied contract as treasurer.—CHRISTIAN V. STATE, Ind., 34 N. E. Rep. 825.

68. LUNATICS — Powers of District Courts. — Where persons are incapable of acting for themselves, as in the case of lunatics, they are entitled to the protection of the court, and proceedings will be instituted under its direction. Suits may be brought in their name, and the court will authorize some suitable person to carry it on as next friend or guardian *ad litem*.—PLYMPTON V. HALL, Minn., 56 N. W. Rep. 351.

68. MASTER AND SERVANT—Defective Appliances.—In an action by an employee for injuries caused by a defective car, a charge that defendant was liable if he failed to provide suitable cars, and "you are further satisfied that, if the defendant had exercised reasonable care and skill in providing such cars," then the defendant is liable, besides being confused and incomplete, is defective, in that it ignores the essential fact of want of knowledge of the defect by plaintiff.—KENTUCKY & I. BRIDGE CO. V. EASTMAN, Ind., 34 N. E. Rep. 835.

69. MASTER AND SERVANT—Negligence.—Defendant's servant, in charge of a gravel train hauling ballast for a side track near a depot, took plaintiff, a seven year

old boy, on the train with him. The train being side-tracked, and a freight train approaching on the main track, plaintiff said that he wanted to go home, and said servant advised him to get on the freight train. Plaintiff got on a heap of gravel, about two feet high, between the tracks, and caught hold of the caboose. As he did so, the gravel slipped under him, and he was caught by the wheels: Held, that the railroad was not liable for that its agents had negligently failed to keep plaintiff off its grounds, and had not used ordinary care to prevent his injury when he was there. The servant's advice to him was not within the former's scope of employment, and, this being the proximate cause of the injury, plaintiff could not recover.—KEATING v. MICHIGAN CENT. R. CO., Mich., 56 N. W. Rep. 346.

70. MECHANIC'S LIENS—Contract of Purchase.—Where building improvements are made on premises for one in possession under a parol contract of purchase only, a mechanic's lien for the improvements does not attach as against the true owner.—SMITH v. HUCKABY, Tex., 23 S. W. Rep. 397.

71. MECHANIC'S LIEN—Waiver and Release.—The acceptance by a mechanic or material man of the note of the debtor, or of a third person, for the amount of the debt maturing within the time fixed by statute for the enforcement of a mechanic's lien, is not alone sufficient to raise any presumption of the extinguishment of the original debt, or of the abandonment or relinquishment of the statutory right to a lien, but an agreement must be shown, that it should have that effect.—I. SMITH & SON CO. v. PARSONS, Neb., 56 N. W. Rep. 326.

72. MORTGAGES—Creditors with Notice.—A note for $2,000, "being money advanced to me to help pay for a house and lot on Jefferson, between 22 and 23 streets, and on which she (the payee), holds a lien until paid," creates no present lien on the property, within Gen. St. ch. 24, § 10, providing that no deed of trust or mortgage shall be valid against creditors without notice until recorded, and may be disregarded by an attaching creditor with notice of it.—SCHMIDT v. CARTER'S ADM'R., Ky., 23 S. W. Rep. 364.

73. MORTGAGE — Deed Absolute in Form.—Where a conveyance of property is shown, by the contemporaneous written contract of the parties thereto, to have been intended solely as security for the payment of money, or as indemnity against liability, such conveyance, as between said parties, must be treated as, and in fact is, a mere mortgage.—NELSON v. ATKINSON, Neb., 56 N. W. Rep. 313.

74. MORTGAGE—Foreclosure—Payment.—In an action to foreclose a mortgage, against the grantees of the mortgagor, it appeared that the records showed a satisfaction of the note described in the mortgage. Complainants produced the note, with payments of interest indorsed thereon after the date of the alleged satisfaction. The mortgagor alleged in his answer that the note was paid at the time satisfaction was recorded by giving a note to be secured on other property, but by mistake the new mortgage covered the same property. The new mortgage was on record when the defendants bought the land: Held, that the land was subject to foreclosure.—SMITH v. STARK, Colo., 34 Pac. Rep. 258.

75. MORTGAGE FORECLOSURE — Res Judicata. — The question of the constitutionality of the provision of Code Civil Proc. § 2798, for depositing with the surrogate for distribution the surplus arising on a sale in an action to foreclose a mortgage on land belonging to the estate of a decedent, is *res judicata* as to a party to an action in which the judgment contains a provision for such deposit, this being a question on which the party had a right to be heard in such action.—IN RE STILLWELL'S ESTATE, N. Y., 34 N. E. Rep. 777.

76. MUNICIPAL CORPORATIONS—Defective Crosswalks. —A crosswalk over an unpaved, and often muddy, street, in whose center was a street car track, was made of two wide four-inch planks, filled in between with cobblestones. The walk was laid two inches higher than the rails, and the ends of the plank were sawed off two or four inches from the rails. They were found, however, to interfere with the scrapers of the cars, and the council therefore had them chamfered or beveled off. Plaintiff's foot slipped on one of these beveled ends, and she was injured: Held, that the beveling, being part of an adopted plan made necessary by the conditions, was not a negligent construction of the walk —BIGELOW v. CITY OF KALAMAZOO, Mich., 56 N. W. Rep. 339.

77. MUNICIPAL CORPORATIONS—Public Improvements. —The mayor and council of a city of the metropolitan class have jurisdiction to create paving districts without a petition of the property owners being presented to the city council, except where the entire improvement is to be done at the cost of the lot owners, in which case they have no power to act, unless petitioned to do so by the owners of the majority of the feet frontage of the lots in such proposed district.—STATE v. BIRKHAUSER, Neb., 56 N. W. Rep. 303.

78. MUNICIPAL INDEBTEDNESS—Constitutional Limitations.—Acts 24th Gen. Assem. ch. 1, which creates a board of park commissioners in certain cities of the first class, and which vests the board with full control over the parks, does not create a new municipality, distinct from the city, of which the board is the governing power, but the board is an instrumentality in aid of the city government, so that the bonds of the park board are a debt of the city, within the meaning of Const. art. 11, § 3, which fixes the limit of municipal indebtedness at 5 per cent. of the valuation of the taxable property therein. — ORVIS v. BOARD OF PARK COM'RS, Iowa, 56 N. W. Rep. 294.

79. NEGLIGENCE — Evidence.—Plaintiff's sons, who were together on a public highway, heard defendant's cart approaching rapidly, and, because of the existing darkness, left the traveled portion to avoid accident, one turning to the right, and the other to the left, and the horse ridden by the latter, and owned by plaintiff, received injuries from a collision with defendant's cart, from which he died. Both boys could have turned to the right, there being a space of 10 feet between the traveled part of the road and the fence on the right: Held, that where, at the time of the accident, there was a space of 20 feet between the boys through which defendant could have driven, and defendant was driving at a high rate of speed, it was for the jury to determine whether the boy whose horse was killed was guilty of negligence in turning to the left, contrary to the provisions of Rev. Code, § 1000, and they were justified in finding defendant guilty of negligence, and in rendering a verdict for plaintiff.—RIEPE v. ELTING, Iowa, 56 N. W. Rep. 285.

80. NEGLIGENCE—Pleading.—In an action against a corporation by one of its employees for personal injuries, an averment in the declaration that the defendant did the acts complained of is sufficient to show that they were done by persons for whom the corporation was responsible.—LIBBY, MCNEILL & LIBBY v. SCHERMAN, Ill., 34 N. E. Rep. 801.

81. NEGOTIABLE INSTRUMENT—Alteration.—In an action on a note, where an alteration therein is shown, the burden is on plaintiff to show that such alteration was made with the consent of defendant.—EMERSON v. OPP, Ind., 34 N. E. Rep. 840.

82. NEGOTIABLE INSTRUMENT — Mistake in Payee's Name.—A complaint, in an action on a note, alleging that, at the time of the execution thereof to plaintiff, defendant through inadvertence and the mutual mistake of parties, wrote therein, as payee, the name of defendant's father, instead of plaintiff's name, states sufficiently, as against a general demurrer, that the mistake was a mistake of fact.—SMITH v. WALKER, Ind., 34 N. E. Rep. 843.

83. NEW TRIAL—Conditional Order—Validity.—An order granting a new trial, which recites that the judgment be set aside on condition that defendant, "before expiration of this term of court, pay all costs of court

that have accrued during the pendency of this appeal to the State; otherwise said judgment to remain in full force and effect,"— is void because of such condition, and the judgment remains in full force and effect.—HARGRAVE V. BOERO, Tex., 23 S. W. Rep. 403.

84. NUISANCE—Beer Garden.—A bill by neighboring residents in a large city alleged the former use of premises as a pleasure resort garden, with tenpins, dancing, and band music till early morning; that the noise would keep the neighbors awake, to the detriment of their health and comfort; that crowds of idle, disorder by persons were attracted, and became a nuisance in the streets; that all this was not due to mismanagement, but inhered in the business; that defendants proposed to reopen the place: Held, that the nuisance was not clearly made out, and, being only threatened could not be enjoined.—PFINGST V. SENN, Ky., 23 S. W. Rep. 358.

85. OFFICE—Resignation of Judge.— Under Const. art. 16, § 17, providing that all officers in the State shall continue to perform the duties of their offices until their successors are qualified, the unconditional tender of his resignation by a county judge creates no vacancy where it is not accepted and is afterwards withdrawn.—MCGHEE V. DICKEY, Tex., 23 S. W. Rep. 404.

86. PARENT AND CHILD—Custody.—When the infant daughters of the relator (their father) are in the custody of the stepmother of the deceased mother of such infants, which stepmother and her husband have demonstrated that they are able, willing, and intend to, and have so far provided for the said infants, in all respects, as they should for their own grandchildren, and it clearly appears that it is for the best interest of said infants that they remain where they now are, such infants will not be delivered to the custody of their father, who has no place, means, or assistance suitably to provide for them.—STATE V. SCHROEDER, Neb., 56 N. W. Rep. 307.

87. PARTITION FENCES—Trespassing Animals.—Where plaintiff and defendant agree to erect and maintain each a part of a division fence between their premises, and without express agreement maintain a hog tight rail fence for 16 years, defendant at the time of the agreement and thereafter raising hogs on his premises, plaintiff may on notice, but without previous agreement, change his part of the rail fence, which has become worn out, to a barb-wire fence, which is not hog-tight, provided it is a lawful fence, as defined by Rev. Code, § 1507, and may recover of defendant for waste done by his hogs passing under such new fence upon plaintiff's premises.—PANTHER V. TRAUMAN, Iowa, 56 N. W. Rep. 289.

88. PARTNERSHIP.—Where there is no sufficient reason for making a sale of the whole of the partnership property, one partner, without consultation with or consent of his copartner, cannot sell the firm property. If, however, the firm is insolvent, one partner, in the firm name, may, in a proper case, give security on a stock of goods to secure a *bona fide* debt of the firm.—HORTON V. BLOEDORN, Neb., 56 N. W. Rep. 321.

89. PARTNERSHIP—Dissolution.—After the dissolution of a partnership, a note executed by one member in the firm name, even in the payment of a debt due from the firm, is not binding on the other members of the firm, unless they have authorized the execution, or unless the payee of the note received the same in ignorance of the dissolution.—FUNCK V. HEINTZE, Tex., 23 S. W. Rep. 416.

90. PLEADING—Amendment.—It is in the discretion of the trial court to refuse to allow an amendment of the complaint by striking out certain admissions therein, after the report of the referee in the case has been made.—BUNO V. GOMER, Colo., 34 Pac. Rep. 256.

91. PLEADING—Amendment.—Where the complaint in an action for conversion describes plaintiffs as heirs of one B, which is merely matter of inducement, an amendment will not be allowed, after trial, so as to count on plaintiffs' rights, as heirs of B, whose estate has not been administered on or distributed, to sue for conversion of property of which they had never been in possession, and which defendant had received under a contract to which plaintiffs were not parties, as such amendment would raise new issues, which would probably require a new trial.—BRADLEY V. PARKER, Cal., 34 Pac. Rep. 234.

92. PLEADING — Exhibits.—In an action to recover money paid on a judgment for costs embracing alleged illegal fees, the payment of the money, and not the judgment, is the foundation of the action; and the court cannot, for the purpose of supplying defects in the complaint, look to exhibits filed with it, purporting to be transcripts of the fees taxed, with separate columns showing what fees are legal and what are illegal.—FULLER V. COX, Ind., 34 N. E. Rep. 822.

93. PLEADING AND PROOF—Chattel Mortgages.—In an action to foreclose a chattel mortgage made subject to a prior one in favor of persons not parties, the failure to allege this fact does not constitute a variance, and the exclusion of the mortgage as evidence on this ground is error.—WYNNE V. ADMIRE, Tex., 23 S. W. Rep. 418.

94. PRINCIPAL AND AGENT—Death of Principal.—On the death of a principal for whom an agent has executed a lease, and collected rents from the lessee, the agency ceases, and payments made thereafter to the agent, before knowledge of the death of the principal, are no defense to an action for the rent by the heirs of the deceased lessor, the agent having failed to pay over the money collected; the fact that the agent was entitled to commissions on rents collected not creating an agency coupled with an interest, and therefore within the exceptions to the will.—FARMERS' LOAN & TRUST CO. V. WILSON, N. Y., 34 N. E. Rep. 784.

95. PUBLIC LANDS—Pre-emption.—Sayles' Civil St. art 3948, provides that if any person claiming a homestead donation shall fail to have the survey made, and the field notes thereof returned to and filed in the land office, within 12 months after the date of his application, he shall forfeit all right to the land: Held that, to relieve one from the operation of the section, on a failure to comply therewith, because of the wrongful acts of the surveyor, such acts must be clearly shown.—TAYLOR V. CRISWELL, Tex., 23 S. W. Rep. 424.

96. PUBLIC LAND—State School Lands—Bona Fide Settler.—Under Act April 1, 1887, § 9, requiring the applicant for the purchase of State school land to be an actual settler, in good faith, an applicant is not entitled to his selection, where he only built a small house thereon, which remained unoccupied, and once plowed a fire guard around it, but lived on other land, where he was employed.—ATKESON V. BILGER, Tex., 23 S. W. Rep. 415.

97. RAILROAD COMMISSIONERS—Injunction.—An averment in a petition to restrain the State railroad commissioners from enforcing an order establishing "through joint rates" of freight from points on plaintiff's line to points on the lines of connecting carriers, that the order was made without authority of law, and in excess of the powers of the commissioners, does not charge that the rate established is unreasonable.—BURLINGTON, C. R. & N. RY. CO. V. DEY, Iowa, 56 N. W. Rep. 267.

98. RAILROAD COMPANIES—Municipal Aid.—Fifty freeholders of Midland township, in Gage county, petitioned the board of supervisors to call an election in said township, and submit to the electors thereof a proposition to vote bonds to aid a certain railroad company to construct its railroad into and through said county of Gage. The supervisors called an election, and submitted to the electors of said township the proposition to vote bonds to aid said railroad company in the construction of its road into and through said township: Held, as no part of the railroad was built in the township, the railroad company was not entitled to the bonds voted.—TOWNSHIP OF MIDLAND V. COUNTY BOARD, Neb., 56 N. W. Rep. 317.

99. RAILROAD COMPANY — Negligence. — Plaintiff's

decedent, in going to defendant's depot to take a train, was run over by a car being kicked into a side track, and killed. Decedent knew he was approaching the track. He was warned that a train was approaching. The whistle was blown, and the bell rung. Decedent did not stop to look or listen: Held, that a verdict should have been directed for defendant.—BANNING v. CHICAGO, R. I. & P. RY. CO., Iowa, 56 N. W. Rep. 277.

100. REAL-ESTATE AGENTS—Commissions.—Defendant agreed to pay a real-estate broker a commission for the sale of certain land. Plaintiff procured certain persons, who agreed to pay the price asked for the land, and the deed was put in escrow. It was part of the agreement that the purchasers should examine the title before certain acceptances given for the property matured, and, if it was found there was not title, there was to be no sale. The title, on examination, proved thoroughly faulty: Held, that the negotiations failed because the buyers exercised their reserved privilege to withdraw from their propositions on a specified contingency which happened, without the fault of defendant, and plaintiff was not entitled to a commission.—CONDICT v. COWDREY, N. Y., 34 N. E. Rep. 781.

101. RECEIVERS—Estoppel—Collateral Attack.—Where an order appointing a receiver of a corporation is void, a judgment creditor of the corporation does not, by intervening in the action for the purpose of enforcing his judgment, waive all objections to the order, and thereby lose the right to levy on the corporate property.—SMITH v. LOS ANGELES & P. R. CO., Cal., 34 Pac. Rep. 242.

102. REPLEVIN—Execution.—Though a mere finding for plaintiff, without assessment of damages, is no proper basis for a judgment, yet the judgment, while it stands, is so far valid as, with the writ of execution, to be evidence in favor of the officer levying thereunder, in replevin for the property seized. — FRUITS v. ELMORE, Ind., 34 N. E. Rep. 829.

103. RIPARIAN RIGHTS — Title to Fee in Street. — W street lies along the north shore of the Ohio river with a defined width, but no lots were ever laid out between the street and the river. The land between the street and river is uninclosed, but has been regularly sold by the original owners and their grantees: Held, that an owner of a lot abutting on the north side of the street owns the fee to the middle of the street only, and has no riparian rights along the river bank.—HASLETT v. NEW ALBANY BELT & TERMINAL R. CO., Ind., 34 N. E. Rep. 845.

104. SALE—Fraudulent Representations—Speculative Opinions.—Statements by the owner of a mining lease to one about to purchase an interest that he was about to go east, and could dispose of the lease at a profit, are speculative matters of opinion, and resting on the future, and are not such fraudulent statements as could invalidate the sale.—BEARD v. BLILEY, Colo., 34 Pac. Rep. 271.

105. SALE—Rescission—False Representations.—Under a complaint to recover goods sold to defendants, alleging that they procured the goods by false representations of their financial condition, but not charging them with suppressing knowledge of their actual condition, a question to plaintiff's selling agent as to what effect it would have had on his dealings with defendants, had they told him of their home indebtedness, was properly ruled out—FRANKLIN SUGAR REFINING CO. v. COLLIER, Iowa, 56 N. W. Rep. 279.

106. SALE—Warranty.—Where a complaint states a cause of action for breach of an express warranty in the sale of a horse, and the case is tried as such, an instruction that, "if no representations were made at the time of the sale, plaintiff cannot recover, does not apply and is properly refused.—DOUGLASS v. MOSES, Iowa, 56 N. W. Rep. 271.

107. SPECIFIC PERFORMANCE—Tender of Payment.—Where a vendee of land pleads and proves his willingness to pay the entire balance due, he is not required, before obtaining a decree for specific performance, to make actual payment, or tender of payment, but is entitled to relief, provided that, within a time to be fixed by the decree, he shall pay the amount due.—KALKLOSH v. HANEY, Tex., 23 S. W. Rep. 420.

108. TAXATION—Assessment.—An assessment of taxable real estate is not invalid because other real estate in the same city, which was in fact taxable, was treated as exempt.—VAN DEVENTER v. CITY OF LONG ISLAND CITY, N. Y., 34 N. E. Rep. 774.

109. TAXATION — Foreign Corporation.—Where the only property that a foreign corporation has within the State is a small amount of furniture in an office, and the only obligations it incurs in the State are for rent of such office, and the salary of its agent in charge of the same, it employs no capital in the State that can be made the basis of taxation.—PEOPLE v. CAMPBELL, N. Y., 34 N. E. Rep. 753.

110. TAXATION — Mineral Estate in Land.—Since the mineral interest in land may be severed from the surface interest thereof by conveyance, thereby becoming separate real estate, it may be taxed as other real estate.—STUART v. COMMONWEALTH, Ky., 23 S. W. Rep. 367.

111. TRIAL — Jurors.—Under Code, § 4405, subd. 11, providing that a juror is disqualified who has such an opinion as would prevent him from rendering a true verdict on the evidence, an opinion does not disqualify a juror, even though some evidence is necessary to remove it.—STATE v. FIELD, Iowa, 56 N. W. Rep. 276.

112. TRIAL—Witness.—Upon the judge asking a witness a question, counsel objected that the witness had already answered that question, to which the judge replied: "I don't think he answered it fairly:" Held, that the judge's remark was not prejudicial error, not being the expression of opinion upon any question determinable by the jury.—CHICAGO CITY RY. CO. v. MCLAUGHLIN, Ill., 34 N. E. Rep. 796.

113. WATERS — Irrigation—Appropriation—Diversion.—Plaintiff alleged a prior appropriation of a water course for irrigation purposes, and a diversion by defendant, and asked for on injunction and damages. The jury found damages $150, but decided nothing as to priority of water rights. Defendant moved for a new trial, which was denied on plaintiff's filing a waiver of any claim that the question of prior rights in the water had been determined, and judgment was rendered for plaintiff for damages: Held error, inasmuch as, if plaintiff had no prior right in the water, he was not entitled to damages, under Const. § 511, providing that prior appropriation shall give the better right between parties using for the same purpose.—CASH v. THORNTON, Colo., 34 Pac. Rep. 268.

114. WIFE'S SEPARATE ESTATE—Rents from Realty.—Rev. St. art. 2851, provides that all property owned by the wife before marriage, or acquired afterwards by gift, devise, or descent, and the "increase of all lands thus acquired, shall be the separate property of the wife; and during the marriage the husband shall have the sole management of all such property:" Held, that the rents accruing on the wife's realty are not her separate property, but are subject to garnishment for the debts of the husband as community property.—HAYDEN v. MCMILLAN, Tex., 23 S. W. Rep. 430.

115. WILL—Trusts—Discretionary Power.—A bequest of a fund to a trustee, to pay the income to testatrix's daughter for life, and "so much of the principal as shall seem to him proper for her support and maintenance," does not create a mere naked power in the trustee in respect to the payment of the principal, which he may execute or not, in his discretion, but imposes an imperative duty on him to pay over to the daughter so much of the principal as may be necessary for her support; and hence the trust may be executed by a trustee appointed by the court on the death of the original trustee, under Rev. St. § 2094, which vests in such trustee all the powers and duties of the original trustee.—OSBORNE v. GORDON, Wis., 56 N. W. Rep. 334.